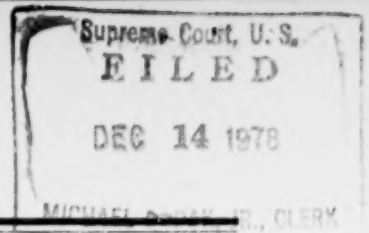


No. 78-498



*In the Supreme Court of the United States*

OCTOBER TERM, 1978

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ROBERT MEYER BOULET, PETITIONER

v.

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE FIFTH CIRCUIT*

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**MEMORANDUM FOR THE UNITED STATES  
IN OPPOSITION**

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WADE H. MCCREE, JR.  
*Solicitor General*  
*Department of Justice*  
*Washington, D.C. 20530*

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Petitioner seeks review of his conviction for income tax evasion on the ground that the government failed to establish with reasonable certainty the amount of cash on hand at the outset of the prosecution years and failed to investigate adequately and eliminate all non-income deposits to his bank accounts. Petitioner's purely fact bound claims lack merit and do not in any event warrant consideration by this Court.

After a jury trial in the United States District Court for the Eastern District of Louisiana, petitioner was convicted on four counts of income tax evasion for 1969-1972, in violation of 26 U.S.C. 7201 (Pet. App. A-6 to A-7). The district court sentenced him to concurrent one-year terms on each count, with all but 90 days of the sentence suspended, and placed him on inactive probation for two years following his release from custody. As a condition

of probation, the court ordered petitioner to pay taxes and penalties due in the total amount of \$59,185.21 (Pet. App. A-7 n.2). The court of appeals affirmed (Pet. App. A-1 to A-23).

1. Petitioner contends (Pet. 16-24) that his prosecution under the bank deposits method of proof was defective because the government failed to establish with reasonable certainty the amount of cash he had on hand at the beginning of the prosecution years.<sup>1</sup> As a part of its case, the government introduced evidence that petitioner had \$15,000 cash on hand as of January 1, 1969, the beginning of the prosecution period. The evidence established that petitioner purchased a \$15,000 cashier's check with cash on January 2, 1969, and that the agents could not find any disbursements out of business or personal accounts that explained the source of the \$15,000 (App. 277-279).<sup>2</sup> Accordingly, the agents credited petitioner with \$15,000 cash on hand as of January 1, 1969, the beginning of the prosecution period (App. 277-278). The evidence also established that beginning in 1962, petitioner, a physician, deposited daily cash receipts from patients in his mother's safe. After he had accumulated three to four thousand dollars in this manner, he would convert it into \$100 bills and place the bills in a safe deposit box. Subsequently he used these funds either to purchase cashier's checks and deposit them in a savings

<sup>1</sup>Under the bank deposits method of proving the receipt of taxable income, the government must introduce evidence to show that, during the years in question, the taxpayer was engaged in income-producing activities, that he made regular deposits of funds into bank accounts, and that it conducted a full investigation of those accounts in order to distinguish between income and non-income deposits. The permissible inference is that the total bank deposits minus the non-income deposits and the amounts on deposit prior to the tax years in question represents taxable income. *United States v. Morse*, 491 F. 2d 149, 152 (1st Cir. 1974).

<sup>2</sup>"App." refers to the joint appendix filed in the court of appeals.

account or for personal expenditures (App. 114-116, 152-153). Beginning in 1962, petitioner frequently purchased savings bonds and certificates of deposit (Pet. App. A-16). He periodically transferred large balances in his childrens' savings accounts to accounts paying higher interest rates and used the interest from those accounts to purchase certificates of deposit (App. 173). In 1966, petitioner opened a savings account into which he deposited funds for the purpose of constructing a home and deposited approximately \$160,000 in this account, including about \$49,000 from other interest bearing accounts (App. 189-190, 192, 194-196).

The determination of the amount of opening cash on hand is a question of fact for the jury. See *United States v. Fisher*, 518 F. 2d 836, 841 (2d Cir.), cert. denied, 423 U.S. 1033 (1975). The court of appeals therefore correctly recognized (Pet. App. A-16 to A-17) that from the evidence presented, the jury could reasonably have concluded that petitioner methodically put his money to work earning interest and was not likely to have had cash on hand as of January 1, 1969, in a non-interest bearing account in an amount greater than the \$15,000 established by the evidence. Indeed, the evidence convincingly refutes any notion that petitioner had sufficient cash to account for the unreported income that he was alleged to have concealed—an amount in excess of \$124,000 for 1969-1972.

Petitioner argues (Pet. 8-9, 20-23) that the agent's computation of his net worth for the years 1962-1968 established that he had unreported income of more than \$145,000 during those years, so that the cash-on-hand figure as of the beginning of 1969 should have been in excess of \$100,000. But in computing petitioner's net worth, the agent clearly established that the major portion of the \$145,000 had been used by petitioner to acquire various other assets (App. 358-379). As the agent

explained on redirect examination (App. 453-457), only \$15,000 of the approximately \$145,000 of unreported income represented cash on hand, with the remainder of that amount having been expended for the acquisition of other assets.

Petitioner also contends (Pet. 10-12, 16, 22-23) that the government's summary expert witness conceded that he could not determine the cash on hand as of January 1, 1969. But the witness did not so concede. When the remark is examined in the context of his entire testimony, it is clear that the witness simply stated that he could not relate, without the assistance of the exhibits which had been admitted in evidence, how petitioner had used the \$145,000 in unreported income for 1962-1968 (see App. 528-531). At all events, as the district court observed in denying petitioner's post-trial motion for judgment of acquittal (see Pet. App. A-24 to A-33), the expert's remark was at worst an erroneous characterization of the state of the evidence. Contrary to petitioner's claim (Pet. 23), the district court correctly concluded that the witness' remark could be disregarded because the evidence established the precise disposition of the \$145,000.

2. Petitioner further argues (Pet. 12-13, 24-32) that the government failed to investigate adequately and eliminate all non-income deposits to his bank accounts. His nurse testified that they often cashed patient's social security checks, welfare checks, payroll checks and the like. From the check would be deducted the amount owed to petitioner for services rendered, and the patient would be given the difference in cash. Petitioner's nurse testified that although some of the cash used to negotiate the checks came from daily receipts, often there was insufficient cash in the daily receipts to cash such checks, and on such occasions petitioner would give the patient the change from his own pocket (App. 13-14, 35-38, 47-49). The agent who conducted the bank deposits analysis

acknowledged on cross-examination that any time petitioner had accepted a third-party check and had given change, the gross deposits figure in his analysis would have been overstated by the amount returned to the patient (App. 319-321). The agent also admitted that he could have examined the microfilmed checks relating to each deposit and thus discovered what portion of each deposit constituted third-party checks (App. 322-323). On these facts, petitioner asserts that the agent's admission that he did not examine the microfilmed checks establishes that the agent's investigation was not adequate to eliminate all non-income items from the bank deposits.

To be sure, in a bank deposits case, the government must establish that it conducted an adequate and full investigation of the bank accounts in an attempt to identify and eliminate all non-income items. *United States v. Morse, supra*. Here, the investigating agent testified concerning the steps he took to discover and eliminate all non-income items (App. 182-183, 188-206, 229-236, 238-241). The agent's failure to examine the microfilmed checks does not establish that his analysis was inadequate. In interviewing petitioner, the agents were told that the overwhelming portion of all deposits to petitioner's bank accounts consisted solely of fees received from patients (App. 88, 149-163). Neither petitioner nor his nurse ever suggested to the agents that a portion of the deposits consisted of third-party checks cashed for patients out of a cash hoard accumulated in prior years (App. 88, 427-428). As the court of appeals recognized (Pet. App. A-21 to A-22), there was no reason for the agent to examine the microfilmed checks relating to the deposits because

they were never told about the third-party checks.<sup>3</sup> Indeed, an examination of the microfilmed checks would have been of no avail because the third-party checks themselves would not have revealed whether the entire amount of the check or only a portion thereof had been given to petitioner in payment of a fee (see Pet. App. A-20).<sup>4</sup> Moreover, even if it could have been determined that only a portion of the check had been given in payment of a fee, the check itself would not have revealed whether the cash given to the patient in change was from current receipts, in which case the entire amount of the check would reflect taxable income, or from a cash hoard accumulated in prior years, in which case only that portion of the check given in payment of a fee would constitute taxable income. Accordingly, the agent's failure to examine the microfilmed checks did not establish that the bank deposits analysis was inadequate. At all events, since the evidence established that petitioner had only \$15,000 cash on hand at the beginning of the prosecution period, which he immediately spent, the jury could reasonably have inferred that any refunds to patients came from current receipts, so that the entire amounts of any third-party checks reflected taxable income (see Pet. App. A-20).

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<sup>3</sup>*United States v. Slutsky*, 487 F. 2d 832 (2d Cir. 1973), cert. denied, 416 U.S. 937 (1974), upon which petitioner relies (Pet. 18), is distinguishable. In *Slutsky*, the agents did examine some of the deposited items. But there the taxpayer had asserted during the course of the investigation that a large amount of the deposits were non-income items (see 487 F. 2d at 836).

<sup>4</sup>Fees paid were recorded on the patients' cards (App. 20). Although petitioner offered to permit the revenue agent to examine the cards (App. 77-78), he refused to permit the Special Agent, who compiled the bank deposits analysis, to examine them (App. 422-424).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.  
*Solicitor General*

DECEMBER 1978